FARAD CONTINUATION SHEET NO.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
NAGPUR BENCH, NAGPUR

First Appeal No. 411/2004
(Santosh Kisan Shirsat Vs. Sou. Sulbha Santosh Shirsat)

Appeal	District :
Application No.	of 200
Writ petition	

Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.	Court's or Judge's orders

Mr. V.S. Dhote, Adv. for the appellant.
Mr. Sameer Adkar, Adv. for the respondent.

CORAM : Smt. Vasanti A. Naik, J.
DATED : 24th August, 2007.

Since this Court had issued the notice to the respondent by an order dated 16/9/2004 and also put the parties to notice that the appeal would be disposed of at the stage of admission, this matter is heard and is being disposed of by this order.

By this first appeal, the appellant challenges the order passed by the Additional District Judge, Washim, in Misc. Judicial Case No. 34/2002, rejecting the application filed by the appellant under the provisions of Section 6 of the Guardian and Wards Act, 1890.

The brief facts giving rise to the present appeal are stated thus:

The appellant is the resident of village Watod and was married to the respondent as per Hindu rites and customs, sometime in the month of May, 1996. The respondent resided with the

appellant at her matrimonial home only for a year and thereafter started residing with her parents. A son named Ajay was born from the wedlock on 14/7/1997 in the house of the respondent's parents.

It appears that the respondent had filed an application against the appellant under the provisions of Section 125 of the Code of Criminal Procedure for grant of maintenance for herself and the minor son Ajay, vide Criminal Application No. 24/1999, in the Court of Judicial Magistrate, First Class, Mangrulpir. The application, so far as it related to the respondent-wife, was rejected. However, the Court granted monthly maintenance to Ajay @ Rs. 400/- from the date of the application. It was recorded by the Judicial Magistrate, First Class, Mangrulpir, that the respondent no.1 left the company of the appellant without any sufficient cause and, therefore, she was not entitled to seek maintenance from the appellant. The appellant had also filed a petition for restitution of conjugal rights in the Court of District Judge, Washim, which was decreed by the Court by the judgment dated 5/9/2000. It is the case of the appellant that in spite of a decree passed against the respondent in the matter of restitution of conjugal rights, the respondent did not join his company. According to the appellant, he was ready to maintain the respondent even on the date of filing of the

application under the provisions of Section 6 of the Guardian and Wards Act, 1890.

It is then pleaded in the application for the custody of the child that there is no independent income of the respondent to maintain the minor son as the respondent is dependent on her parents and the parents of the respondent are also poor labourers. It was also pleaded in the application that the appellant and his father were doing some business and nobody was dependent on the appellant. It was then pleaded that the parents of the appellant would take proper care of the minor if he is placed in the custody of the appellant and further see that the interest of Ajay was protected.

The appellant submitted evidence on affidavit and also filed affidavit in examination-in-chief of his father Kisan and mother Gumfabai. It was stated in the affidavits filed by the grandmother and grandfather of the child that they had love and affection for the minor child and they would take proper care of the child if he was given in the custody of the appellant. In the absence of any evidence tendered on behalf of the respondent, the trial Court considered the evidence tendered by the appellant and his parents on the affidavit. The trial Court, on a consideration of the evidence on record, declined to grant the custody of the child to the appellant, mainly for the reason that the child was

born on 14/7/1997 and nothing was done by the appellant till the year 2002 to either meet his child Ajay or to seek his custody. The trial Court considered the fact that the appellant did not go to the house of the parents of the respondent to see the child after his birth. The Court observed that a father would visit his child if he had some love and affection for his child. The Court considered the fact that the appellant-father had done nothing for almost six years and did not seek custody of the child until the Judicial Magistrate, First Class allowed the application filed by the minor child for maintenance and granted maintenance to him @ Rs. 400/- per month. According to the trial Court, these circumstances were sufficient to presume that the appellant filed the application for the custody of the child merely because a competent Court compelled the appellant to pay the maintenance for the child. The Court considered the conduct of the appellant that since the birth of the child till the passing of the order on the maintenance application, the appellant had not seen the child or paid him anything for his maintenance. The trial Court further brushed aside the affidavits filed by the parents of the appellant as the affidavits were silent as to why the grandparents of the child had not taken any steps to meet the child or to seek his custody, since 1997 till the date of filing of the

application for custody, though they had love and affection for the child.

The trial Court then rightly observed that the respondent could arrange for the basic needs of the child from the amount of maintenance received by the child from the appellant. The Court observed that the custody of the child could not be granted to the appellant in the aforesaid circumstances merely because the respondent had no income of her own. The Court further rightly held that the appellant had failed to produce any documentary evidence to show his position in the business and also his financial capacity. The Court observed that the appellant did not furnish the copy of order passed by the Judicial Magistrate, First Class, on the application under the provisions of Section 125 Cr.P.C. or the reply filed by him in those proceedings, though the Court posed the aforesaid query to him and this had resulted in the trial Court taking a view that what was stated by the appellant about his earning capacity in the present application, was not believable. The trial Court, therefore, dismissed the application filed by the appellant primarily on the ground that the application was filed with a view to avoid the payment of maintenance to the child as the appellant had done nothing for the child for a period of nearly six years and had also not seen him during

that long span. According to the trial Court, this clearly shows that the case put forth by the appellant about love and affection for the child was not acceptable.

I see no reason to interfere with the judgment passed by the trial Court on 19th April, 2004. The approach of the Additional District Judge, Washim, in handling the matter of custody of the minor child was extremely just and reasonable.

The appeal is, therefore, dismissed with no order as to costs.

JUDGE

RMP